PRECEDENTIAL

Filed May 20, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-3943

WIM DELVOYE, in the Matter of
Sebastian Delvoye, an infant under the age of one,
Appellant,

v.

CHRISTINA LEE

On Appeal from the United States District Court
For the District of New Jersey
(D.C. Civ. No. 02-cv-00769)
District Court Judge: Faith S. Hochberg

Argued: February 13, 2003

Before: ALITO and McKEE, Circuit Judges, and
SCHWARZER,* Senior District Judge
(Filed: May 20, 2003)

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* Honorable William W Schwarzer, Senior United States District for the Northern District of California, sitting by designation.

DEAN G. YUZEK (ARGUED)
JOAN WALTER
Ingram Yuzek Gainen Carroll &
Bertolotti, LLP
250 Park Avenue
New York, NY 10177

BERNARD G. POST
950 Third Avenue
New York, NY 10022

Attorneys for Wim Delvoye, in the Matter of Sebastian Delvoye, an infant under the age of one, Petitioner-Appellant

ROBERT W. AVERY (ARGUED)
Avery & Avery
559 Bergen Boulevard
Ridgefield, NJ 07657

SUSAN M. LEE
32 Sylvan Avenue
Englewood Cliffs, NJ 07632

Attorneys for Christina Lee, Respondent-Appellee

OPINION OF THE COURT

SCHWARZER, *Senior District Judge.*

This is an appeal from an order of the district court denying Wim Delvoye's petition to return Baby S to Belgium under the *Hague Convention on the Civil Aspects of International Child Abduction*, Oct. 25, 1980; T.I.A.S. No.

11670, 19 I.L.M. 1501 (the "Convention").[1] The district court found and concluded that petitioner had failed to meet his burden of proving that Baby S was an habitual resident of Belgium and thus was wrongfully removed from that country. We affirm.

[1] The Convention is implemented at 42 U.S.C. § 11603 (2003).

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner and respondent met in New York early in 2000. Petitioner resided in Belgium but made several trips to visit respondent. On his visits to New York, a romantic relationship developed between them. In August 2000, respondent moved into petitioner's New York apartment. While continuing to live in Belgium, petitioner spent about a quarter of his time in New York. In September 2000, respondent learned that she was pregnant with petitioner's child. Respondent began prenatal care in New York, but because petitioner refused to pay the cost of delivery of the baby in the United States and Belgium offered free medical services, respondent agreed to have the baby in Belgium. In November 2000, she traveled to Belgium on a three-month tourist visa, bringing along only one or two suitcases. She left the rest of her belongings, including her non-maternity clothes, in the New York apartment. While in Belgium respondent lived out of her suitcases. When her visa expired she did not extend it. The baby was born on May 14, 2001. By then the relationship between the parties had deteriorated. After initially resisting, petitioner signed the consent form that enabled respondent to get an American passport for Baby S and agreed to respondent's return to the United States with Baby S in July 2001. Over the next two months, petitioner made several trips to the United States and the parties made several attempts to reconcile. When those efforts failed, petitioner filed this petition. Following an evidentiary hearing, the district court denied the petition. This appeal followed. Because the order is a final disposition of the petition, we have jurisdiction under 28 U.S.C. § 1291.

DISCUSSION

Article 3 of the Convention provides in relevant part:

> The removal . . . of a child is to be considered wrongful where – a) it is in breach of rights of custody attributed

> to a person . . . either jointly or alone, under the law of the State in which the child was *habitually resident* immediately before the removal. . . .

(Emphasis added.)

The determination of a person's habitual residence is a mixed question of fact and law. We review the district court's findings of historical and narrative facts for clear error, but exercise plenary review over the court's application of legal precepts to the facts. *Feder v. Evans-Feder*, 63 F.3d 217, 222 n.9 (3d Cir. 1995); *see also Mozes v. Mozes*, 239 F.3d 1067, 1073 (9th Cir. 2001).

The issue before us is whether Baby S was "habitually resident" in Belgium at the time of his removal to the United States. In *Feder*, we defined the relevant concept:

> [A] child's habitual residence is the place where he . . . has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective. . . . [A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.

63 F.3d at 224. The district court held that petitioner had failed to meet his burden of proving that Baby S was an habitual resident of Belgium. It reasoned that a two-month-old infant, who is still nursing, has not been present long enough to have an acclimatization apart from his parents.

This case then presents the unique question of whether and when a very young infant acquires an habitual residence. It differs from the run of decisions under the Convention where the child is assumed to have an habitual residence initially and the controversy is over a change of that residence. No

decisions have squarely addressed the issue before us. The leading treatise on the Convention provides some general guidance:

> There is general agreement on a theoretical level that because of the factual basis of the concept there is no place for habitual residence of dependence. However, in practice it is often not possible to make a distinction between the habitual residence of a child and that of its custodian. Where a child is very young it would, under ordinary circumstances, be very difficult for him . . . to have the capability or intention to acquire a separate habitual residence.

Paul Beaumont & Peter McEleavy, *The Hague Convention on International Child Abduction* 91(1999). An English court has said: "The habitual residence of the child is where it last had a settled home which was in essence where the matrimonial home was." *Dickson v. Dickson*, 1990 SCLR 692. And an Australian court has stated: "A young child cannot acquire habitual residence in isolation from those who care for him. While 'A' lived with both parents, he shared their common habitual residence or lack of it." *Re F* (1991) 1 F.L.R. 548, 551.[2]

Where a matrimonial home exists, i.e., where both parents share a settled intent to reside, determining the habitual residence of an infant presents no particular problem, it simply calls for application of the analysis under the Convention with which courts have become familiar. Where the parents' relationship has broken down, however, as in

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[2] These cases assume that the parents had joint custody. This is true under Belgian law regardless of whether the parents are married. *See* H. Bocken and W. DeBondt, *Introduction to Belgian Law* 150 (cohabiting parents) (2001). But the situation is different where only one parent has custody rights. Thus, "where a child of [two years of age] [was] in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers." *In re J (C v. S)* [1990] 2 AC 562, 579.

this case, the character of the problem changes. Of course, the mere fact that conflict has developed between the parents does not *ipso facto* disestablish a child's habitual residence, once it has come into existence. But where the conflict is contemporaneous with the birth of the child, no habitual residence may ever come into existence.

That is not to say that the infant's habitual residence automatically becomes that of his mother. In *Nunez-Escudero v. Tice-Menley,* 58 F.3d 374 (8th Cir. 1995), Nunez-Escudero and Tice-Menley married in Mexico in August 1992. A child was born there in July 1993. In September, Tice-Menley left Mexico with her two-month-old infant and returned to the United States. Nunez-Escudero filed a petition under the Convention alleging that his son had been wrongfully removed. The district court denied the petition on the ground that return of the child would subject him to a grave risk of harm. The court of appeals reversed and remanded. The mother contended that the court should affirm, notwithstanding the erroneous grave risk of harm determination, on the ground that the infant was not an habitual resident of Mexico. The court rejected the argument and remanded for a determination of the child's habitual residence, stating,

> To say that the child's habitual residence derived from his mother would be inconsistent with the Convention, for it would reward an abducting parent and create an impermissible presumption that the child's habitual residence is where the mother happens to be.

58 F.3d at 379.

The instant case differs from *Nunez-Escudero*. Because the petitioner and respondent had married in Mexico and lived there together for nearly a year before the child was born, a basis existed for finding the child's habitual residence to be in Mexico. Here, in contrast, the district court found that

respondent, at petitioner's urging, had traveled to Belgium to avoid the cost of the birth of the child and intended to live there only temporarily. She retained her ties to New York, not having taken her non-maternity clothes, holding only a three-month visa and living out of the two suitcases she brought with her. Thus, there is lacking the requisite "degree of common purpose" to habitually reside in Belgium. As explained in *Re Bates*,

> There must be a degree of settled purpose . . . . All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, United Kingdom (1989), quoted in *Feder*, 63 F.3d 223.

Because petitioner and respondent lacked the "shared intentions regarding their child's presence [in Belgium]," *Feder*, 63 F.3d at 224, Baby S did not become an habitual resident there. Even if petitioner intended that he become an habitual resident, respondent evidenced no such intention. Addressing the status of a newborn child, one Scottish commentator said:

> [A] newborn child born in the country where his . . . parents have their habitual residence could normally be regarded as habitually resident in that country. Where a child is born while his . . . mother is temporarily present in a country other than that of her habitual residence it does seem, however, that the child will normally have no habitual residence until living in a country on a footing of some stability.

Dr. E. M. Clive, "The Concept of Habitual Residence," *The Juridical Review part 3*, 138, 146 (1997).

Based on the district court's factual findings, which have not been challenged, we conclude that petitioner failed to prove that Baby S was habitually resident in Belgium.

We affirm the district court's order.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WIM DELVOYE,

Petitioner,

v.

CHRISTINA LEE,

Respondent.

Civil Case No. 02-769 (FSH)

OPINION

Date: September 24, 2002

HOCHBERG, *District Judge*

This matter comes before the Court by Wim Delvoye's petition for the return of his son (referred to as "Baby S") to Belgium under the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"), Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501. Petitioner contends that Baby S was wrongfully removed from Belgium by Christina Lee (Respondent), Petitioner's former girlfriend and the mother of Baby S, and that under the Convention Baby S should be returned to Belgium so that the Belgian courts may adjudicate a custody hearing.

FACTS

Petitioner and Respondent first met during February or March 2000 when Petitioner was an artist and Respondent was working for an art gallery. Petitioner and Respondent

began a romantic relationship shortly thereafter. Petitioner testified that during the months of March and April 2000, he traveled to New York from Belgium approximately five times, solely to see Respondent. During those visits, Petitioner and Respondent stayed in Petitioner's Manhattan apartment. As the relationship progressed, Petitioner and Respondent met a few more times, again staying in Petitioner's apartment in Manhattan, and, on one occasion, meeting in Belgium.

In August 2000, Respondent moved into Petitioner's Manhattan apartment.[1] Petitioner lived mostly in Belgium at the time, but spent about a quarter of his time in New York. When Respondent moved into the apartment, she brought with her a number of items, including a night table, a kitchen table and chairs, books, a television, clothes, a microwave, shoes, jewelry, kitchenware, and other items.

Respondent learned in late September 2000 that she was pregnant. After a number of discussions regarding the possibility of an abortion – which Petitioner vehemently opposed – the couple decided to carry the baby to term and Respondent began prenatal care in New York City. Petitioner, on at least one occasion, joined Respondent on a visit to her obstetrician in New York.

The original plan was to have the baby in the United States. On or about October 2000, the parties discussed the cost of having a baby in the United States. Petitioner testified that he was told that the cost would be about $20,000 and that he thought this was "really funny" (in the surprising sense). Petitioner testified that a person could "even get money [for giving birth] in Belgium." Both parties testified that Petitioner refused to pay for any of Respondent's

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[1] Petitioner testified that Respondent was renting the Manhattan apartment from him. Under cross-examination, however, he stated that she never paid him any rent.

medical costs if the baby were carried to term in the United States. Rebecca Sutherland, a graduate student at Harvard University who is a close personal friend of Respondent, was telephoned by Petitioner several times in his effort to get Sutherland to persuade Respondent to travel to Belgium temporarily so as to take advantage of that country's free medical services.

The parties' testimony differs on the purpose of their travel to Belgium. Petitioner testified that he asked Respondent to join him in Belgium since he was settled there, had a large apartment there, and based his artistic career there.[2] Respondent testified that Petitioner adamantly insisted that she join him in Belgium for the term of the pregnancy, threatening not to pay for any medical care if she did not do so. She testified that her decision to travel to Ghent, Belgium was made under duress, as she was afraid about financing the pregnancy and wanted very much to get married. Respondent at all times believed that her travel to Belgium was temporary and she planned to return to the United States as soon after the birth of her baby as she could safely travel. After returning to the United States, Respondent testified, the couple would always keep a Manhattan apartment and would also consider a metropolitan European city as a future second residence. Respondent's testimony was corroborated by Ms. Sutherland, whose testimony was based substantially on direct conversations with Mr. Delvoye. Before the birth, Mr. Delvoye told Ms. Sutherland that Ms. Lee and her baby would spend at least half the year in New York, with the remainder in Europe – either in Belgium, Paris or London.

In November 2000, when Respondent was four months pregnant, she traveled to Belgium on a three-month tourist visa. She brought along only one or two suitcases filled with

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[2] Petitioner is a recognized contemporary artist in Belgium, whose productive efforts are shown in New York, Belgium and elsewhere.

maternity clothing. Respondent did not remove her belongings from the Manhattan apartment; rather, she left her non-maternity clothes, books, jewelry, shoes, microwave, dishes and furniture in New York.

Petitioner's apartment in Ghent, Belgium consisted of a large loft space where he lived and worked. Sutherland testified that Petitioner's loft could be reached only by scaling several steep flights of stairs, the last flight of which had no railing. (Late in the pregnancy, a railing was installed.) Petitioner and Respondent slept on a mattress on the floor in one part of the loft, which had no closets or dividing walls. The only private room was a bathroom. In the middle of the loft was a long table that Petitioner used for his art work.

Sutherland testified that when she visited Ghent in March 2001, Respondent was still living out of a single suitcase, which was not unpacked. Indeed, during Respondent's entire stay in Belgium, she lived out of her suitcase. Neither Petitioner nor Respondent took any steps to extend Respondent's three-month tourist visa or to obtain any permanent visa. Despite having great difficulties communicating in a region where people spoke mostly Flemish, Respondent never attempted to learn Flemish. Baby S was born in Belgium on May 14, 2001. The parties' relationship was deteriorating both before and after the birth of their child.[3] Respondent testified that she sought

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[3] Respondent blames the deteriorating relationship on Petitioner's uncontrollable rage and his increasingly bizarre forms of art, which consisted of replicating human excrement and/or animal or human copulation depicted in x-rays. At the hearing, much of Petitioner's art was introduced into evidence by Respondent in an attempt to lay the foundation for a claim that the return of Baby S to Belgium would pose a grave risk of psychological harm for Baby S. To this end, Respondent introduced pictures of Petitioner's art, including pictures of: an x-ray of Petitioner licking a pig's anus; an x-ray of pigs arranged so as to depict them having sex; x-rays of women performing fellatio; an x-ray of male

to return to the United States earlier than July 23, 2001, but she could not get a United States passport for the baby without Petitioner's consent, which he initially declined to give. During arguments, Petitioner threatened to have Respondent deported without her baby. After continued fighting, Respondent testified, Petitioner finally consented to Respondent's departure with Baby S – instructing her to "[l]eave with the baby now before I get attached."

Petitioner thereupon signed a two-parent consent form needed to obtain a United States passport for Baby S. Petitioner drove Respondent and Baby S to the airport and

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genitalia beside a woman's breasts; pigs tattooed by Petitioner; and stained glass windows with x-rays ranging from pigs to an x-ray of Petitioner's nephew surrounded by pigs. Pictures were also shown of Petitioner's Cloaca machine, a large machine that is fed regular human food and, twenty four hours later, excretes the biological equivalent of human feces. Evidence was also introduced that Petitioner used pictures taken from sonograms of the baby in his art.

Respondent also alleges that Petitioner's interest in contemporary art led Petitioner to examine human excrement in odd ways. According to Respondent, Petitioner was very excited while changing diapers because of his fascination with human excrement. In addition, Respondent alleges that Petitioner, when his sister's infant daughter was being changed, expressed interest in examining the infant's private parts.

Respondent testified that Petitioner also used her in his art work, bringing her to a radiologist two weeks after giving birth to be x-rayed with her vagina filled with barium into which a sexual object had been inserted. When Respondent objected, Petitioner threatened to do the x-ray with another female friend.

Respondent sought to introduce into evidence a psychological report of Petitioner prepared by an expert hired by Respondent. However, the expert was unable to attend the hearing. The proceeding was therefore bifurcated and consideration of the expert's report and expert testimony as to risk of psychological harm were stayed pending resolution of the issues that would not require expert testimony. Only if those issues were not dispositive would the Court then reach the issue of grave risk of psychological harm.

they returned to the United States.[4] Although Petitioner testified that he only agreed that Respondent could return to the United States with Baby S for a short visit, his behavior at the airport suggests otherwise[5] Respondent and Baby S moved in with Respondent's mother in Fort Lee, New Jersey.

Petitioner returned to the United States on a number of occasions between July 2001 and January 2002. While the parties disagree on the nature of the trips – whether for business or to visit Respondent and Baby S – it is undisputed that on these trips the parties tried in vain to reconcile. While attempting to reconcile, Petitioner offered to return to the United States and to make a home there.[6] He and Respondent investigated housing options in New York, as his Manhattan apartment was too small for a family. In a letter to Respondent's mother, Petitioner also offered to pay for the child's education in America.

At the hearing, Petitioner acknowledged having repeatedly lied to Respondent in a tactical ploy to win back Respondent's affections. In one letter to Respondent, Petitioner wrote that he had seen a psychiatrist and that he had spent some time in a hospital, implying that he had been treated for his psychological problems and that his psychological condition was much improved. At the hearing,

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[4] The airline tickets purchased by Respondent were round-trip tickets. Respondent testified that she purchased round-trip tickets because they were discounted fares that were cheaper than one-way fares. Respondent testified that she never intended to use the return ticket. She never did. Respondent's testimony was not refuted on this issue with any evidence to the contrary, nor with any impeachment of Respondent's testimony.

[5] Petitioner was extremely emotional, videotaping Respondent and Baby S throughout the airport to keep a memory of the baby. He also requested a piece of the baby's clothing to keep as a remembrance.

[6] In a letter from Petitioner to Respondent dated August 14, 2001, Petitioner stated: "I am willing to come and settle with you in New York – if you want that."

however, Petitioner testified that he never saw a psychiatrist and was never in a hospital. Indeed, Petitioner had simply fabricated the statements. Petitioner also testified that he had previously lied to the Belgian authorities by obtaining a letter falsely claiming that he had a mental problem that prevented him from serving in the military.

When the parties were unable to resolve their differences amicably, Petitioner filed a petition seeking the return of Baby S to Belgium under the Convention.

STANDARD OF REVIEW

The Convention is an international treaty created in an attempt to "protect children . . . from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence. . . ." Convention, Preamble. In 1988, Congress passed the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601 *et seq.* (1988), to establish procedures to implement the Convention in the United States. The established procedures are "aimed at maintaining the status quo and deterring parents from crossing international boundaries in search of a more sympathetic court." *Wanninger v. Wanninger*, 850F. Supp. 78, 80 (D. Mass. 1994) (citing *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993)).

Under the Convention, a district court is authorized to adjudicate the merits of a wrongful removal or detention claim, but not the underlying custody dispute. *Friedrich*, 983 F.2d at 1400. The inquiry is therefore limited to whether removal or retention of the child in question was "wrongful" under the Convention. Convention, Arts. 3, 12; *see also Feder v. Evans-Feder*, 63 F.3d 217, 221 (3d Cir. 1995). Petitioner has the burden of proving, by the preponderance of evidence, wrongful removal or retention. 42 U.S.C. § 11603(e)(1)(A). Under Article 3 of the Convention,

removal or retention of a child is "wrongful" where: "(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." Convention, Art. 3. Removal or retention under the convention is only wrongful if the child is removed from his or her "habitual residence." *See Friedrich*, 983 F.2d at 1400. The remedy for wrongful removal or retention is the return of the child. Convention, Art: 12; *Feder*, 63 F.3d at 221.

The general rule of return has four exceptions:

> (1) grave risk that return of the child would expose [him] to physical or psychological harm; (2) violation of fundamental principles of the requesting State relating to the protection of human rights and fundamental freedoms; (3) delay more than one year after the child [has] become settled in a new environment; or (4) consent by the petitioner to the removal or retention.

Wanninger, 850 F. Supp. at 81. Once Petitioner meets his burden of proving wrongful removal or retention, Respondent has the burden of proving an exception. The first two exceptions must be proved by clear and convincing evidence, while the latter two need only be proved by a preponderance of the evidence. 42 U.S.C. §§ 11603(e)(2)(A) and (B).

DISCUSSION

Respondent has presented three alternate grounds for denying the petition to return Baby S to Belgium. First, Respondent argues that Petitioner has not proven wrongful removal or retention of Baby S because he has failed to meet his burden of proving by a preponderance of the evidence

that Belgium is the habitual residence of Baby S. In the alternative, Respondent argues that Petitioner consented to the baby's removal from Belgium to the United States, thereby putting this matter under the fourth exception to the return of a child to his or her habitual residence. Finally, Respondent argues that return of the infant to Belgium would pose a grave risk of psychological harm to him.

Habitual Residence

The term "habitual residence" is not defined in the Convention or ICARA. Courts have conducted fact-based analyses that evaluate whether a child's presence in a country is of sufficient duration to have a "degree of settled purpose" from the child's perspective, as well as the parents' shared intentions regarding their child's presence in a country. *Feder*, 63 F.2d at 224. In *Feder*, the Third Circuit explained that:

> [A] child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" from the child's perspective. . . . [A] determination of whether any particular place satisfies this standard must focus on the child and consists of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.

Id. at 224. In *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), the court found that "settled intent" regarding habitual residence requires more than a mere intent to change residence. *Id.* At 1075. Rather, there must be some intent to abandon the prior habitual residence. *Id.*

In this Circuit it is clear that the parents' shared intentions regarding the child's presence in a country are considered along with an analysis of the child's circumstances there. Feder, 63 F.3d at 224. In the case of a newborn infant who is still nursing, it is particularly appropriate to focus on parental

intentions in determining a child's habitual residence. *Cf. In re Ponath*, 829 F. Supp. 363, 367 (D. Utah 1993). A two-month old neonate simply has not been present anywhere long enough to have an acclimatization apart from his parents.

In the present case, the witnesses offer conflicting testimony about their intentions regarding Baby S's habitual residence. Petitioner testified that the couple had decided to move to Belgium indefinitely after they decided that Respondent would carry the baby to term. Respondent testified that they decided to live only temporarily in Belgium for the later months of her pregnancy, and that this decision was made only after Petitioner complained about the high cost of carrying a child to term in the United States and refused to pay any of the medical costs of pregnancy and delivery in the United States. According to Respondent, the temporary move was meant to end shortly after the baby's birth.

Respondent's account of the events is supported by the testimony of Ms. Sutherland, who testified to conversations with both Petitioner and Respondent indicating that the move to Belgium was intended to be temporary. Petitioner himself testified that he wanted Respondent to go to Belgium to avoid the high cost of carrying a child to term in the United States. He also told Ms. Sutherland that Respondent and the baby would thereafter live in the United States for at least six months each year.

In the face of conflicting testimony, this Court must make credibility determinations based on its perception of the parties as witnesses and on the evidence offered to support or refute the parties' testimony.[7] In observing the witnesses, the Court notes that Petitioner failed to answer many questions

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[7] The Court makes credibility determinations reluctantly in such a proceeding. *Cf. In re Ponath*, 829 F. Supp. at 366 n.3 making a credibility determination in a child abduction case).

directly. Petitioner's credibility is also damaged by the fact that he has admitted lying to Respondent throughout their relationship. For example, Petitioner told Respondent that he had seen a psychiatrist and that he had been to the hospital "for four days, recovering from grief and cleaning up the bad spirits with a good doctor"– statements that Petitioner admits having made but acknowledges were untrue. Petitioner also acknowledges having obtained a false letter about a "made up" psychiatric condition which was given to the Belgian authorities.

Respondent's testimony, by contrast, was not significantly impeached and was corroborated by Ms. Sutherland. Ms. Sutherland offered the most calm, composed and credible testimony of the three witnesses. Neither side impeached Ms. Sutherland's credibility, and testimony was given that both Petitioner and Respondent trusted Ms. Sutherland and sought her help in their attempts to reconcile. This Court therefore finds the testimony offered by Respondent and Ms. Sutherland relating to the habitual residence more credible than the conflicting testimony of Petitioner.

The Court's decision to credit Respondent's testimony that Belgium was not the habitual residence of the neonate is also supported by the substantial weight of the circumstantial evidence. Petitioner owned his New York apartment and invited Respondent to move in there. When she did so, Respondent brought with her furniture and other items that are consistent with moving to a permanent residence. Upon finding out that she was pregnant, Respondent started her prenatal care in New York with a New York doctor. It is undisputed that the primary motivation to have the baby in Belgium was to obtain free medical care and avoid the high cost of carrying a baby to term in the United States. No evidence was presented to indicate that the parties thought that the departure from New York would be permanent. For example, there was no "going-away" party; no sale of the

New York apartment; no removal of furniture from the New York apartment; and no removal of Respondent's non-maternity clothing from the New York apartment. *See Kanth v. Kanth*, 239 F. Supp. 2d 1317 (D. Utah 1999) (where parties did not sell property in the United States and took no other steps consistent with a permanent move, habitual residence did not change in a move lasting less than one year). The parties applied for only a three-month tourist visa for Respondent and never applied for any visa extension or a permanent visa. Respondent brought nothing more than one or two suitcases filled with maternity clothing to Belgium. While there, Respondent lived out of her suitcases, having never fully unpacked. Respondent did not take classes in Flemish and never sought employment in Belgium. *Cf. Feder*, 63 F.3d at 224 (intent of parents evidenced by purchase of new house and future employment decisions). Petitioner offered no evidence to show that the parties had planned any steps to settle Baby S into life in Belgium.[8] By contrast, Petitioner's correspondence with Respondent's mother, written shortly after Respondent and Baby S returned to the United States, revealed Petitioner's intention to educate the infant in the United States. In short, the parties' intentions and actions do not support the view that Belgium was the habitual residence of Baby S despite his birth and first sixty days of life in that country.[9]

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[8] The Court notes that many parents do not take active planning steps for their infant children. However, in examining the circumstances surrounding the parties' stay in Belgium, the Court looked for circumstantial evidence relating to any factor that supports Petitioner's position. No such evidence was presented.

[9] Once in Belgium, Petitioner may have changed his mind and wanted to make Belgium the family's habitual residence. However, a unilateral decision or change of heart by one party cannot change the settled intent of the parties regarding the habitual residence. *Feder*, 63 F.3d at 225. The settled joint intent of the parties here was to move to Belgium only temporarily.

Petitioner argues that the "settled intent" cases do not apply because they all involve situations in which a court had to choose between two different countries in which the child had lived *prior* to the alleged wrongful removal or retention.[10] Here, he argues, the baby was out of the womb exclusively in Belgium for the two months before respondent took him to New York, and therefore his only possible habitual residence is Belgium. While Petitioner cites a number of cases in which a young child was returned to the country in which he or she was born, there are distinguishing factors that, when taken together, set this case distinctly apart from those cases. Here, Respondent was already pregnant at the time she left the United States and entered Belgium; the parents' intent was for the stay in Belgium to be a temporary money-saving measure; Respondent only remained in Belgium for the latter months of her pregnancy and immediate postpartum period before taking steps to depart; the infant was two months old and nursing at the time he left Belgium with his mother and there were no other older children in question, *cf. Tsarbopoulos v. Tsarbopoulos*, 176 F. Supp. 2d 1045 (E.D. Wash. 2001) (children were five-years, two-years, and two-months old); and the father drove the mother and baby to the airport after signing a consent to give the baby a U.S. passport. These factors, taken together,

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[10] During the hearing, Petitioner's counsel somewhat retreated from his position. The Court asked the following:

> Court: Well, let me ask you this hypothetically. Are you saying that if [the parties] agreed to go to Belgium to have this baby and [returned to the United States] within a week after being in Belgium, when she was able to travel again and return to the United States, that this baby has to stay in Belgium?
>
> . . .
>
> Petitioner's Counsel: . . . I'm not prepared to press my point to that degree . . . . I have considered your honor's hypothetical and I think that could raise other issues.

set this case apart from the cases relied upon by Petitioner to support his "birth country" theory."[11]

This Court rejects any bright line rule that a child born in a country is automatically a habitual resident of that country, regardless of all other evidence to the contrary. That is not the analysis mandated by this Circuit in *Feder*. Surely, if a couple lives in the United States and gives birth to a child during a summer visit to a vacation home in the Swiss Alps, the habitual residence of the child is not Switzerland. The situation in the present case, while slightly more drawn out, is no different. The parties never jointly intended to make their permanent home in Belgium, and the birth of a baby during a short stay there to save on medical bills does not

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[11] Petitioner relies heavily on *Nunez-Escudero v. Tice-Medley*, 58 F.3d 374, 375 (8th Cir. 1995) to support this theory. In *Nunez-Escudero*, the father and mother resided and wed in Mexico. *Id.* at 375. Approximately eleven months after being wed, the parents had a child, also in Mexico. *Id.* Three months later, the mother took the child to the United States. *Id.* The father appealed, stating that Mexico was the habitual residence. *Id.* The mother argued that she always thought she would return to the United States but was forced to stay in Mexico until she finally left. *Id.* at 378. The mother also argued that an infant cannot have a habitual residence of its own and must therefore follow the mother. The Eighth Circuit rejected the mother's arguments. The court noted that the habitual residence cannot derive solely from the mother's residence, as it would be inconsistent with the Convention: Id. at 379. The court distinguished *In re Ponath*, in which a child was returned to the United States after the family temporarily moved to Germany, by explaining that the child in question in *Nunez-Escudero* was always in Mexico.

The holding in *Nunez-Escudero* is not at odds with this Court's view. In this case, the Court's decision regarding the infant's habitual residence is not derived from a conclusion that because the Respondent wants to be in the United States, so should the baby. Rather, the decision is based on the fact that both Petitioner and Respondent's stated intent to Ms. Sutherland, corroborated by all of the circumstantial evidence, is that Belgium was only a temporary place to give birth. In *Nunez-Escudero*, there was no comparable evidence. In this case, moreover, there is an utter lack of evidence to support Petitioner's burden to prove that Belgium is where the infant resided with "a degree of settled purpose."

change the parties' "degree of settled purpose" regarding their child's habitual residence. There is no credible evidence that the stay in Belgium was ever jointly intended to be anything more than temporary. Rather, the overwhelming weight of the evidence is that both parties' stated intent before the birth was to go to Belgium to bear the baby, followed shortly thereafter by a return to New York as a home base for at least half of the year.

The Court finds that the Petitioner has failed to meet his burden to prove that Belgium is the habitual residence of Baby S. Thus, there has been no wrongful removal or retention of the infant.[12]

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[12] Given this Court's conclusion as to the habitual residence of Baby S, it is unnecessary to address Respondent's argument that Petitioner consented to Respondent's removal of the infant to the United States within the meaning of Article 13a of the Convention. If it were to reach the consent issue, however, this Court would be inclined to find that Petitioner did, in fact, consent to the infant's removal. Based upon the fact that Petitioner signed a two-parent consent form for the infant's U.S. passport within days after instructing Respondent to "[l]eave with the baby now before I get attached," Petitioner's highly emotional request for a memento of the baby prior to his departure, and his extended videotape of the departure scene at the airport, this Court does not find his testimony that he only consented to a two week visit to the United States credible.

It is also unnecessary for the Court to decide at this time whether return of the infant to Belgium would pose a grave risk of psychological harm under Article 13b of the Convention. Because Respondent's expert psychologist was unavailable at the hearing, the Court bifurcated this issue from the other issues in the case. Petitioner's pending *in limine* motion to exclude the expert's report and testimony is therefore dismissed as moot. The Court does note, however, that many serious questions were raised at the hearing regarding Petitioner's psychological condition. If it were necessary to reach the issue of psychological harm, this Court would take the testimony of the psychologist and consider appointing its own expert to examine.Mr. Delvoye.

CONCLUSION

For the foregoing reasons, Wim Delvoye's petition to return Baby S to Belgium is denied based upon insufficient evidence having been adduced to meet his burden of proving that Baby S was a habitual resident of Belgium and thus was wrongfully removed from that country. An appropriate order will issue."[13]

/s/ FAITH S. HOCHBERG
HON. FAITH S. HOCHBERG, U.S.D.J.

[13] Given the Court's disposition of this matter after a full evidentiary hearing, Petitioner's pending motion for summary judgment is dismissed as moot.

COURT PAPERS
00714.036

FILED
SEP 27 2002

ENTERED
ON
THE DOCKET
SEP 27 2002

WILLIAM T. WALSH, CLERK
By /s/
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WIM DELVOYE,

Petitioner,

v.

CHRISTINA LEE,

Respondent.

Civil Case No. 02-769 (FSH)

ORDER

Date: September 24, 2002

HOCHBERG, *District Judge*

This matter having come before the Court by Wim Delvoye's Petition For Return Of Child To Belgium pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 19 I.L.M. 1501, and the International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et seq.*; and this

Court having fully considered the submitted briefs and the record before it after a full hearing on the merits; and for the reasons expressed in the opinion issued this same day; and for good cause shown

IT IS on this 24st day of September, 2002,

ORDERED that the petition is **DENIED**;

ORDERED that all other pending motions in the above-captioned matter are **DISMISSED** as moot; and

ORDERED that this case is **CLOSED**.

/s/ Faith S. Hochberg

Hon. Faith S. Hochberg
United States District Judge

THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

CHAPTER I - SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attaint the age of 16 years.

Article 5

For the purposes of this Convention –

a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER III - RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b) where available, the date of birth of the child;

c) the grounds on which the applicant's claim for return of the child is based;

d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e) an authenticated copy of any relevant decision or agreement;

f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to

the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal of retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal of retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be determination on the merits of any custody issue.

Article 20

The return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

Ch. 121 CHILD ABDUCTION REMEDIES

§ 11601. Findings and declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes –

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

* * *

§ 11603. Judicial remedies

(a) Jurisdiction of courts

The Courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of the case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence –

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing –

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter –

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the

return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.